


Texas Water Development Board

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TO: Board Members

FROM: Kevin Patteson, Executive Administrator 

DATE: May 19, 2014

SUBJECT: Resolution of the Interregional Conflict between the 2011 Region C and the Region D Regional Water Plans

ACTION REQUESTED

Resolve the interregional conflict between the 2011 Region C and Region D regional water plans by instructing the Region C Regional Water Planning Group to readopt its current regional water plan with Marvin Nichols Reservoir as a recommended water management strategy and instructing the Region D Regional Water Planning Group to amend its plan to reflect that the conflict has been resolved.

BACKGROUND

Region C Planning Area

The Region C Regional Water Planning Area (Region C) includes all or parts of 16 counties. Overlapping much of the upper portion of the Trinity River Basin, Region C also includes smaller parts of the Red, Brazos, Sulphur, and Sabine river basins. The Dallas-Fort Worth Metropolitan area is centrally located in the region, and its surrounding counties are among the fastest growing in the state. Major economic sectors in the region include service, trade, manufacturing, and government.¹

The population of Region C counties is expected to increase 96 percent by 2060 to 13 million people. The area contains approximately 26 percent of the Texas population. The 2011 Region C Plan estimates that by 2060 an additional 1.7 million acre-feet of water per year will be needed to serve the region's population (a total 2060 demand of 3.3 million acre-feet of water per year). Conservation accounts for 12 percent of the projected 2060 volumes; reuse accounts for another 11 percent. Currently, the Marvin Nichols Reservoir (Marvin Nichols) is projected to provide 490,000 acre-feet per year, or 28 percent of the projected additional water needed.²

¹ Texas Water Development Board, *Water for Texas 2012 State Water Plan*, pg. 44.

² *Id.* at 46-50.

Our Mission

To provide leadership, planning, financial assistance, information, and education for the conservation and responsible development of water for Texas

Board Members

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Region D Planning Area

The North East Texas Regional Planning Area (Region D) encompasses all or parts of 19 counties in the north-east corner of the state. Largely rural and characterized by numerous small communities and some medium-sized municipalities, the region includes the cities of Longview, Texarkana, and Greenville. The planning area overlaps large portions of the Red, Sulphur, Cypress, and Sabine river basins and smaller parts of the Trinity and Neches river basins. The main economic base in the North East Texas Region is agribusiness, including a variety of crops as well as cattle and poultry production. Timber, oil and gas, and mining are significant industries in the eastern portion of the region. In the western portion of the region, many residents are employed in the Dallas-Fort Worth metropolitan area.³

Approximately 3 percent of the state's population resides in Region D. By 2060, Region D's population is projected to grow 57 percent, to 1.2 million. The 2011 Region D Plan estimates that by 2060 an additional 278,000 acre-feet per year will be needed to serve the region's population (a total 2060 demand of 839,000 acre-feet of water per year). Because of high costs relative to the small amounts of water involved, the Region D Plan does not recommend conservation as a water management strategy. Select major water management strategies include increasing existing surface water contracts, or 60 percent of projected 2060 volumes, new surface water contracts for another 33 percent, and new groundwater supplies for 7 percent of projected 2060 volumes.⁴

Marvin Nichols Reservoir in the State Water Plan

Senate Bill 1 (SB 1) in 1997 created the current state water planning process.⁵ Before the implementation of SB 1, Marvin Nichols was recommended as a water management strategy in the 1968 State Water Plan, the 1984 State Water Plan, and the 1997 State Water Plan. Under SB 1, the first Region D Regional Water Plan in 2001 recommended that Marvin Nichols be developed to provide a source of future water supply for water users both within Region D and in Region C. The 2001 Plan was later amended to remove support for the development of Marvin Nichols, however. The 2006 Region D Regional Water Planning Group took the position that Marvin Nichols should not be included in any regional plan or in the State Water Plan as a water management strategy. Further, the Region D Regional Water Planning Group expressed the opinion that the inclusion of Marvin Nichols in the Region C Regional Water Plan constituted an interregional conflict.⁶ Following the policy established with the first series of water plans, the Texas Water Development Board (TWDB) approved both the Region C and Region D 2006 Regional Water Plans because it did not find an over-allocation of a source of supply—the TWDB's definition of an interregional conflict.

³ Texas Water Development Board, *Water for Texas 2012 State Water Plan*, pg. 50.

⁴ *Id.* at 52-54.

⁵ Tex. S.B. 1, 75th Leg., R.S., 1997 Tex. Gen. Laws 1010.

⁶ Copies of the previous regional and state water plans are available on the TWDB website, <http://www.twdb.texas.gov/waterplanning/rwp/plans/index.asp> and <http://www.twdb.texas.gov/waterplanning/swp/index.asp>.

In 2007, the 80th Legislature established a study commission on Region C Water Supply that consisted of members appointed by the regional water planning groups of Regions C and D.⁷ The Study Commission was charged with reviewing the water supply alternatives available to the Region C Regional Water Planning Area. But the Study Commission was unable to reach a consensus on its findings and recommendations, so a final report was not delivered to the 82nd Legislature.⁸

In 2011, the Region C Regional Water Planning Group again adopted Marvin Nichols as a recommended strategy and Region D reiterated concerns it had raised previously. Region D again expressed the opinion that including Marvin Nichols in the Region C Regional Water Plan constituted an interregional conflict. The TWDB approved the Region D Regional Water Plan in October 2010, and the Region C Regional Water Plan in December 2010, finding again that there was no over-allocation of supply sources. To date, Marvin Nichols has not been constructed and no permits for its development have been sought from the Texas Commission on Environmental Quality (TCEQ) or the U.S. Corps of Engineers.

The Ward Timber Case Procedural History

Private parties in Region D filed suit in District Court in Travis County in January 2012, seeking judicial review of the TWDB's decision approving the Region C Regional Water Plan.⁹ In its order issued on December 5, 2011, the District Court declared that an interregional conflict existed, reversed the TWDB's decisions approving the two regional plans, and remanded the case to the TWDB for resolution. The TWDB appealed. The 11th Court of Appeals heard the case and affirmed the district court's ruling on May 23, 2013.¹⁰ No further motions were filed.

The TWDB contracted for a mediator and arranged for a mediation between Region C and Region D members appointed by their respective regional planning groups. The mediator reported on December 17, 2013 that the parties did not reach agreement in the mediation. Thus, under the statute and the Court's Order, the TWDB is to resolve the conflict.

The core dispute between Region C and Region D is whether Marvin Nichols should be developed in the north-central part of Region D to serve the water needs in Region C. Region C already contains more than a quarter of the state's population and will increase by almost 100 percent by 2060. At 28 percent of the projected additional water needed for the Region, Marvin Nichols is a major water strategy to serve Region C by 2060.

Region D does not want Marvin Nichols constructed because it is concerned about the potential socioeconomic, environmental, and private property impacts of the reservoir. Estimated at 66 to 70 thousand acres in size, Marvin Nichols is projected to impound thousands of acres of forest

⁷ Tex. S.B. 3, § 4.04, 80th Leg., R.S., 2007 Tex. Gen. Laws 1430.

⁸ *Final Draft Report to the 82nd Legislature*, Study Commission on Region C Water Supply, December 2010. The Draft Report and other documents related to the work of the Study Commission are available on the TWDB website at <http://www.twdb.texas.gov/waterplanning/rwp/regions/C/studycommission.asp>.

⁹ *Ward Timber, Ltd.; Ward Timber Holdings; Shirley Shumake; Gary Cheatwood; Richard LeTourneau; and Pat Donelson v. Texas Water Development Board*, No. D-1-GN-11-000121 (126th Dist. Ct., Travis County, Tex., Dec. 5, 2011).

¹⁰ *Texas Water Dev. Bd. v. Ward Timber, Ltd.*, 411 S.W.3d 554 (Tex. App.—Eastland 2013, no pet.).

and wetlands. In addition, thousands more acres would be required for environmental mitigation—all for a project that does not serve and is not needed by the residents of the region.

ANALYSIS

What is a Conflict?

This is the first time the TWDB has been asked to resolve a conflict under the statute. As the 11th Court of Appeals noted, Section 16.053(a) of the Water Code requires that a regional plan provide for the development of water resources in preparation for and in response to drought conditions in order that sufficient water will be available at a reasonable cost to ensure public health, safety, and welfare; to further economic development; and to protect the agricultural and natural resources of that particular region.¹¹

Section 16.053(h)(7) provides that the TWDB may approve a regional plan only after it has determined that:

- (A) all interregional conflicts involving that regional water planning area have been resolved;
- (B) the plan includes water conservation practices and drought management measures incorporating, at a minimum, the provisions of Tex. Water Code §§ 11.1271 and 11.1272 (relating to water conservation and drought contingency plans); and
- (C) the plan is consistent with long-term protection of the state's water resources, agricultural resources, and natural resources as embodied in the guidance principles adopted under Tex. Water Code § 16.051(d).

Section 16.0519(d) of the Water Code requires the TWDB to adopt guidance principles for the state water plan that reflect the public interest of the entire state. The guidance principles must give due consideration to the construction and improvement of surface water resources and the application of principles that result in voluntary redistribution of water resources.

Both the Plaintiffs/Appellees in the *Ward Timber* case and the 11th Court of Appeals discussed resolution of an interregional conflict and long-term protection of the state's resources together. They are, in fact, however, two different determinations as set out in the statute. A dispute between regions on protection of the state's resources, or on conservation and drought management, does not necessarily equate to an interregional conflict over allocation of resources among strategies.

"Conflict" is not defined in the statute. The definition employed by the TWDB beginning in 2001 and used consistently through the development of three state water plans was that an interregional conflict exists when more than one regional water plan relies upon the same water source, so that there is not sufficient water available to fully implement both plans, creating an

¹¹ *Ward Timber*, 411 S.W.3d at 558.

over-allocation of that source.¹² This definition was codified in TWDB's rules in 2012. The decision of the Court of Appeals in 2013 questioned the sufficiency of the definition to address what it determined to be an interregional conflict between Region C and Region D and declined to follow that definition. The Court did not suggest an alternative definition, however.

Under the statutory scheme relating to regional water planning and interregional conflicts, the TWDB decides whether an interregional conflict exists.¹³ The definition used by the TWDB over three cycles of water planning and adopted as a rule is consistent with the language of Texas Water Code Section 16.053 in defining "interregional conflicts" as conflicts arising between two or more defined water-management strategies that are necessary to ensure the implementation of all plans. The TWDB does not consider every difference between regional water plans to be a "conflict" as contemplated by the statute, nor does it recognize the geographic location of the water source as an aspect of the conflict. Instead, this definition focuses on resolving those conflicts that hinder full implementation of the state water plan by rendering an identified supply strategy inadequate for two or more regions.

The definition of interregional conflict adopted by the TWDB also recognizes that the legislature intended for the TWDB to address conflicts between actual water management strategies, not general objections to projects that are properly reserved for agencies other than the TWDB if and when permit applications for projects are filed.

Unlike the water uses addressed directly in the state and regional water plans (municipal, manufacturing, irrigation, steam electric power generation, mining, and livestock), water needed to protect environmental and natural resources is difficult to quantify. TWDB rules require that regional water planning groups evaluate each recommended strategy for social and economic impacts of not meeting needs, impacts to agricultural resources, consideration of third-party social and economic impacts, and evaluations of effects on environmental flows.¹⁴ Thus, protection of agricultural and natural resources and economic interests is considered in the regional plans in relation to specific, quantifiable strategies. At the planning stage, it should be sufficient that all regions affected by a particular strategy have identified those impacts.

The Regional Water Plan Review Process

In addition to ensuring that all interregional conflicts have been resolved, the TWDB must also determine that the plan includes water conservation practices and drought management measures, and that the plan is consistent with long-term protection of the state's water, agricultural, and natural resources. The TWDB's guidance principles, embodied in its rules instruct the regional water planning groups in how to address these requirements.¹⁵

The guidelines adopted by the TWDB in compliance with the statute are currently found in 31 Tex. Admin. Code §§ 357.20, 358.3, and 358.4. These rules are based on Tex. Water Code §§ 16.051(d), and 16.053(e) and (h)(7). The TWDB reviews the regional water plans and

¹² 31 Tex. Admin. Code § 357.10(15).

¹³ Tex. Water Code § 16.053(h)(4), (5), and (6).

¹⁴ 31 Tex. Admin. Code § 357.34.

¹⁵ See 31 Tex. Admin. Code §§ 357.22, 357.34-.35, and 357.40-.42.

prepares the state water plan based on these guidelines and requirements.

Under these principles, in reviewing the regional water plans the TWDB provides technical assistance to the regional planning groups, works with regional planners to address inconsistencies, to seek clarification, to note mistakes in citations, and to identify where the plan does not follow the guidance principles or does not adhere to the formatting guidelines. But the TWDB does not evaluate the sufficiency or validity of strategies presented in a plan. It does not do alternative analyses or redirect recommended strategies. This approach is in keeping with the philosophy behind SB 1 that each plan reflect the efforts of the local regional planning group and others in the region to evaluate and implement the planning decisions for their particular region.

Options Considered Related to the Conflict Over Marvin Nichols

Staff considered three options in analyzing possible recommendations to resolve the conflict over Marvin Nichols.

1. One recommendation proposed a smaller reservoir. Reducing the footprint of Marvin Nichols would mean that less property would be needed for the reservoir; but less water would be provided. Therefore, Region C would need to find alternatives to meet any remaining needs. Future rounds of planning could incorporate future changes, and creative problem-solving in the planning process might address concerns for both regions.

Staff ultimately rejected this proposal, however. To propose reducing the size of Marvin Nichols means interjecting the TWDB in the engineering specifics of a particular strategy in a region's plan—something the TWDB has not done before. This approach would be a change in the TWDB's State Participation Program policy of supporting the optimal sizing of a facility. It would also mark a shift away from the planning process as locally driven.

2. The second option Staff considered was removing Marvin Nichols from Region C's Plan for this planning cycle. Removing it now would resolve the conflict but does not eliminate the possibility of including it at a later date if conditions warrant. The regional plan is just that—a planning document. Strategies may come and go from one plan to another. Just because a strategy is in the plan does not mean that it will become reality. Just because it is deleted from the plan does not mean that it has no future. Marvin Nichols is included in Region C's Plan as a water source beginning in 2030. Yet it is not clear what steps are being taken to have the resource in place by then. Marvin Nichols has been part of a state water plan since 1968. It has not been built, in part because it is a potential strategy to meet needs beginning at a future date. Project sponsors have yet to apply for a permit.

Experience with other reservoir development suggests that much work still needs to be done before the reservoir becomes a reality. Thus, the future of Marvin Nichols rests with those who want Marvin Nichols as a source.

Staff acknowledges, however, that Marvin Nichols is a long-term strategy. Reasonable planning involves development first of those short-term projects that cost less and are easy to implement. Long-term strategies always assume a large number of uncertainties. Therefore, striking a

strategy because of uncertainties 15, 20, even 40 years in the future is not a reasonable approach to planning.

Both Region C and Region D acknowledge the need for more study, which is a responsible approach given the size, potential expense, and timing of the strategy. The Sulphur River Basin Feasibility Study by the U.S. Corps of Engineers in conjunction with the Sulphur River Basin Authority currently underway is focused on water supply issues and water user groups in the Basin. That independent study, expected to be completed in 2015, could answer many of the uncertainties before the permit process is initiated.

3. The third recommendation Staff consider was to retain the Marvin Nichols Reservoir as a recommended strategy in the Region C 2011 Regional Water Plan. In the end, Staff chose this option. As Texas's population grows, Marvin Nichols, along with all the strategies in the Region C Plan, must continue to be considered seriously. According to the 2011 Region C Water Plan, Marvin Nichols accounts for 28 percent of the total additional acre-feet per year that will be needed to serve Region C's population. To remove Marvin Nichols from the Region C Plan would leave a substantial unmet need in Region C's water supply by 2060. TWDB data suggest that as many as 141 municipalities, communities, and water suppliers would be affected. Reassigning other recommended strategies to fill the gap created by removing Marvin Nichols would, in turn, simply create other unmet needs that would need to be addressed.

TWDB rules require that regional water planning groups identify and recommend water management strategies that meet all water needs during the drought of record.¹⁶ In addition, regional water plans must include a quantitative description of the socioeconomic impacts of *not* meeting identified water needs.¹⁷ The TWDB, therefore, generally will not approve a regional or state water plan that contains unmet needs. In particular, it has avoided approving a regional plan that contained unmet municipal needs in the long-term planning horizon because of the potential impacts on public health, safety, and welfare. Including Marvin Nichols responds to the facts of both the current size of Region C and its anticipated growth. Continuing to include Marvin Nichols also acknowledges the recent legislative mandate in House Bill 4 and Senate Joint Resolution 1 to develop and fund the strategies in the plan as opposed to excising strategies at a critical time for water supply development in Texas.

Some have suggested that Region C address its needs through conservation. But, as noted earlier, conservation is already included in Region C's Plan.¹⁸ And, even by the most liberal estimate, conservation cannot make up all the need that the region will have over the next 50 years.

Property owners in the area where Marvin Nichols may be located are justifiably concerned about the loss of their lands and the economic value attached to those lands. Any one or more of the municipalities or water districts in Region C could sponsor Marvin Nichols.

¹⁶ 31 Tex. Admin. Code § 357.35(d).

¹⁷ 31 Tex. Admin. Code §§ 357.33(c), 357.40(a).

¹⁸ See page 1.

The Texas Constitution provides in part that “No person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person;” Tex. Const. Art. I, § 17.

Thus, while a municipality has the right of eminent domain under Chapter 251 of the Local Government Code, and water districts have a similar right under Chapter 49 of the Water Code, the law provides for just and fair compensation for both the value of the property and damages to the landowner. The procedures for the exercise of eminent domain are set out in statute and are intended to protect the right of a property owner to just compensation. Any such evaluation of lands potentially included in Marvin Nichols is subject to those provisions and cannot be determined here.

PROPOSED RESOLUTION OF THE CONFLICT

On March 4, 2014 the Executive Administrator issued a preliminary draft recommendation to resolve the conflict between Region C and Region D 2011 regional water plans. The draft recommendation was posted on the Texas Water Development Board website, along with the announcement of a public comment period and two public hearings. On April 29 and 30, 2014 public hearings were held in Region D and Region C. Approximately 450 people attended the April 29 hearing in Mt. Pleasant and 150 people attended the April 30 hearing in Arlington. The public comment period ended on May 2, 2014. More than 7,300 comments were received by the TWDB.

The TWDB reviewed the comments and has provided responses (*See* Attachment 6). Changes to the preliminary recommendation as discussed in Attachment 6 have been incorporated in the recommendations below.

SUMMARY

SB 1 created an important document in the state water plan. It is to be “a guide to water policy.”¹⁹ But the regional and state water plans are only plans—*guides* to water policy. TCEQ is only required to take the plan *into consideration*. It is not bound by the plan and may waive the consistency requirement if conditions warrant. The Water Infrastructure Fund (WIF), the State Implementation Fund for Texas (SWIFT), and the State Water Implementation Revenue Fund for Texas (SWIRFT), require that a project be in the State Water Plan for the TWDB to provide financial assistance to that project. If a water project to receive financial assistance under a TWDB program other than the WIF, SWIFT, or SWIRFT, it must be *consistent* with the State Water Plan, not necessarily *in* the State Water Plan. The TWDB may waive the requirement for consistency with the State Water Plan if the financial assistance is for a water project under a TWDB program other than the WIF, SWIFT, or SWIRFT, and the TWDB determines that conditions warrant the waiver.²⁰

Regional and state water plans are planning level documents. Both the Region C and Region D planning groups acknowledge that more studies need to be done on critical strategies including

¹⁹ Tex. Water Code § 16.051(b).

²⁰ Tex. Water Code § 16.053(k).

Marvin Nichols. The decision of whether to proceed with the development of Marvin Nichols or any other reservoir development strategy rests with the regional planners, the project sponsors, and the state and federal agencies that grant the licenses and permits necessary for the project to proceed.

The TWDB's task is to prepare a state water plan every five years that includes regional water plans adopted by regional water planning groups and approved by the TWDB in preparation for and in response to drought conditions.²¹ None of the factors the TWDB must consider in approving a regional water plan involves a substantive analysis of the validity or sufficiency of the strategies in a plan. But allowing for any unmet needs that may affect public health, safety, and welfare in the face of another drought of record would not comply with the intent of the statute, nor would it address the legislative mandate to develop the strategies in the State Water Plan.

The Executive Administrator therefore recommends the following steps for the Board to resolve the conflict between Region C and Region D. In addition, the Executive Administrator proposes the attached timeline for public comment and consideration of this recommendation.

RECOMMENDATIONS

The Executive Administrator recommends that the Board resolve the conflict between Region C and Region D by taking the following steps:

1. Applying the TWDB's definition of interregional conflict, 31 Tex. Admin. Code § 357.10(15), pursuant to Section 16.053(h)(7)(A) of the Water Code, the Executive Administrator recommends a finding that no interregional conflict as defined in TWDB rules exists between Regions C and D.
2. Regarding resolution of the conflict between Region C and Region D relating to construction of a reservoir and long-term protection of resources in the area to be impounded pursuant to Section 16.053(h)(7)(C) of the Water Code, the Executive Administrator recommends the following:
 - a. Instruct Region C to retain Marvin Nichols as a recommended strategy in its 2011 Water Plan, and to update Chapter 10 of its Plan, relating to the Plan Approval Process, to reflect the mediation, this TWDB action, and other actions taken to effect this decision; or, if the Board wishes to consider an alternative recommendation, the Board may consider

Instructing Region C to make Marvin Nichols Reservoir an alternative strategy and to elevate consideration and possible development of all other existing sources and water supply strategies to meet its water supply needs.
 - b. Instruct Region D to amend its 2011 Water Plan by removing references in the Region D 2011 Plan to the conflict as listed on Attachment 5 of this recommendation and

²¹ See Tex. Water Code § 16.051(a).

updating Chapter 10 of its 2011 Plan to reflect the mediation, this TWDB action, and other actions taken to effect this decision;

c. Instruct both regions to participate in the completion of the ongoing Sulphur River Basin Study;

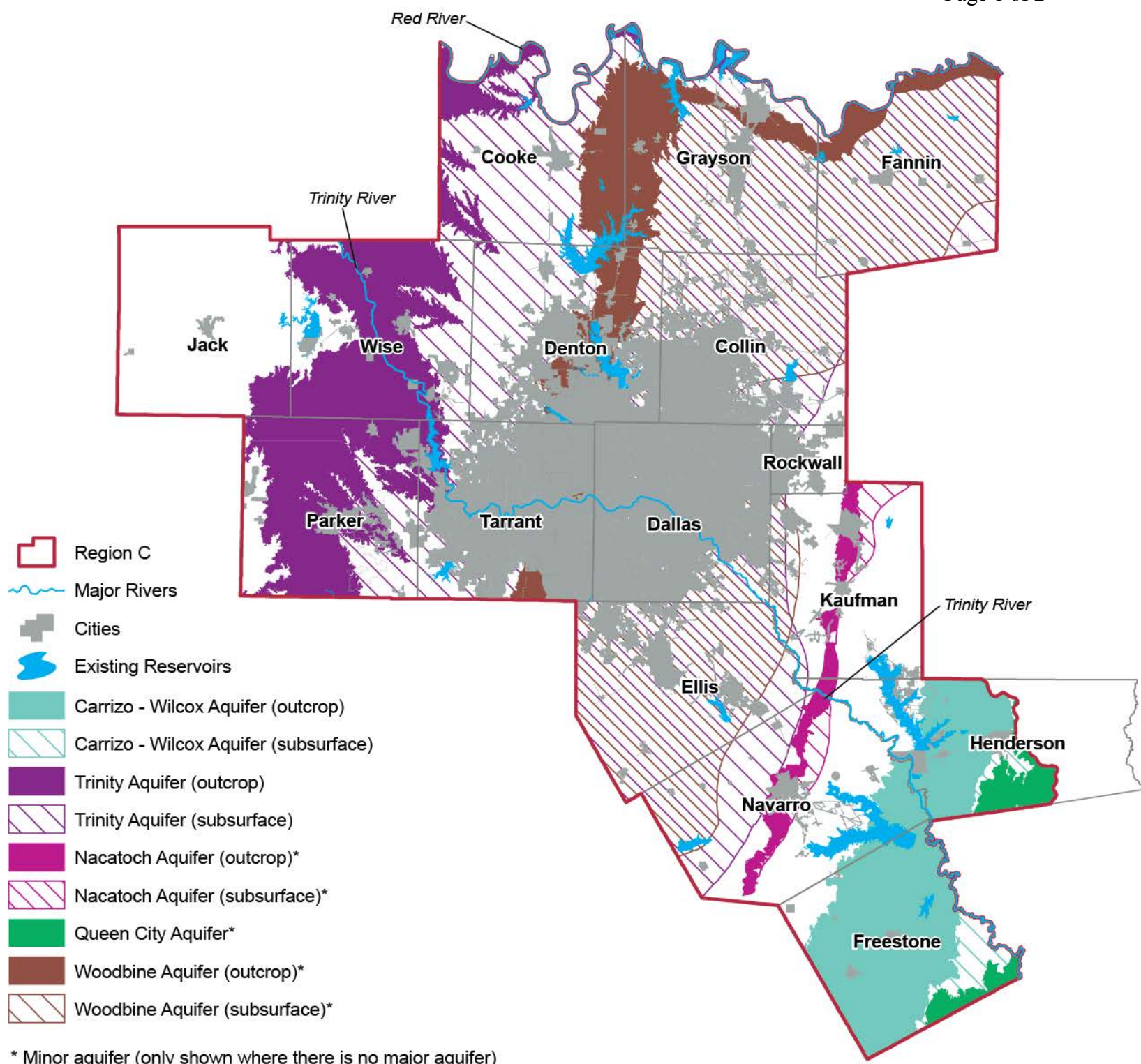
d. Instruct Region C to accelerate consideration of alternative strategies, including additional conservation measures and additional water supply alternative including Wright Patman Reservoir, Toledo Bend Reservoir, and George Parkhouse Reservoir, to meet needs where uncertainties exist regarding current strategies;

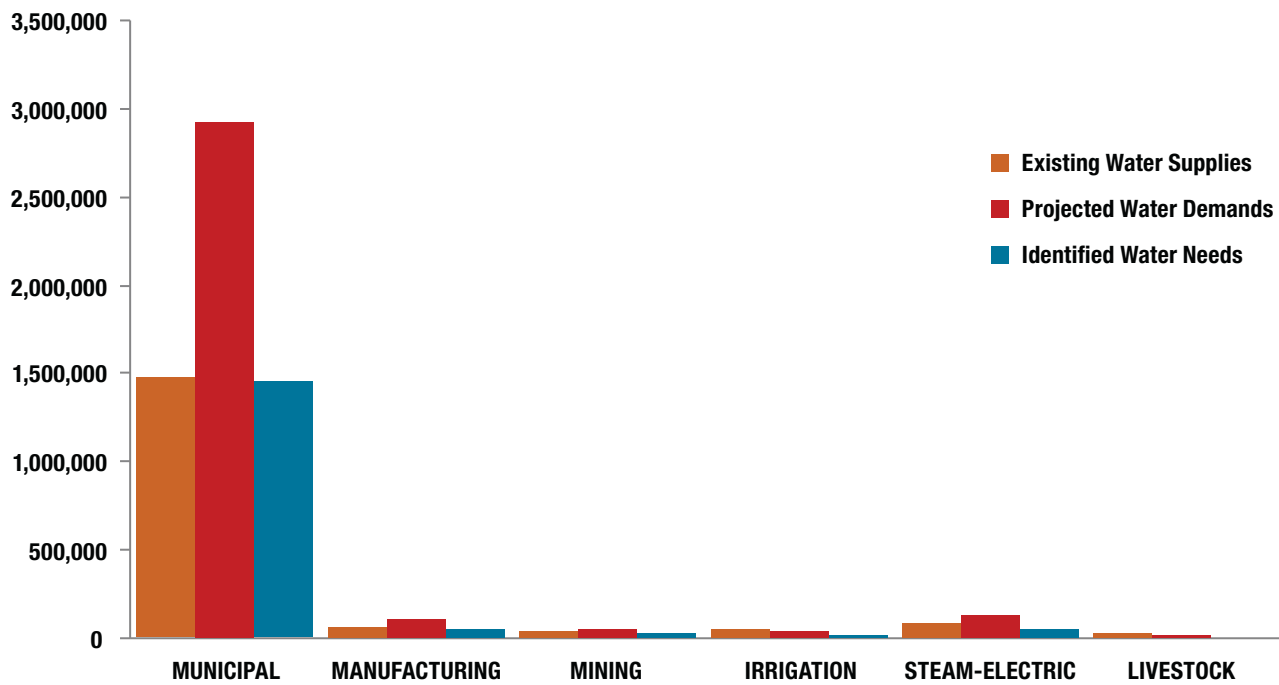
e. Encourage Region C to share mitigation measures for any project developed for Region C in Region D in proportion to the interest Region C water providers have in the water produced by the project; and

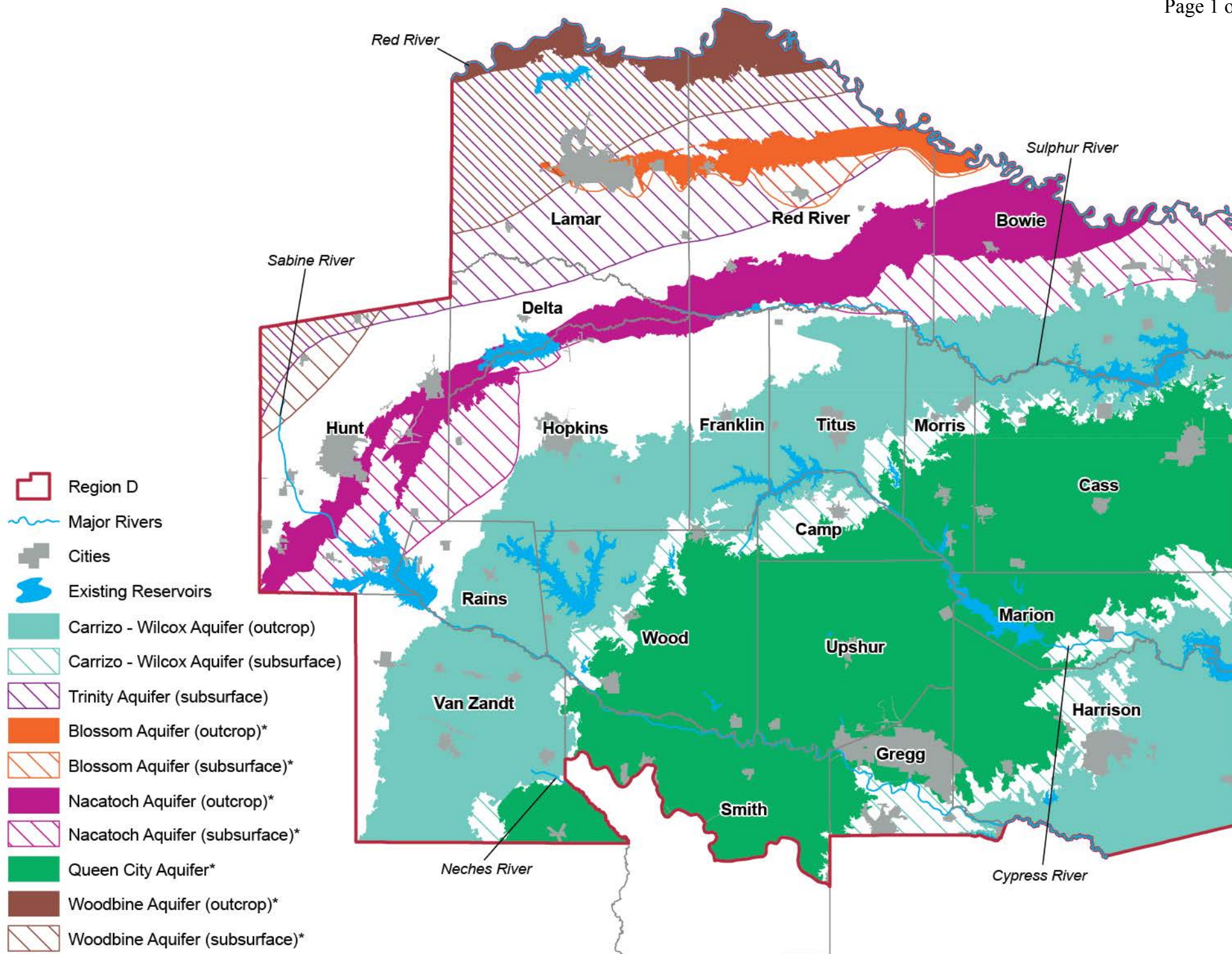
f. Instruct the Region C and Region D regional water planning groups to place review of the Board's decision and the setting of a public hearing on the next regional water planning group meeting and post notice as required by statute. Following the public hearing, each regional water planning group is to meet to adopt and submit plans amended in accordance with this directive to the TWDB for TWDB approval no later than 45 days from the date of the public hearing.

Attachment(s):

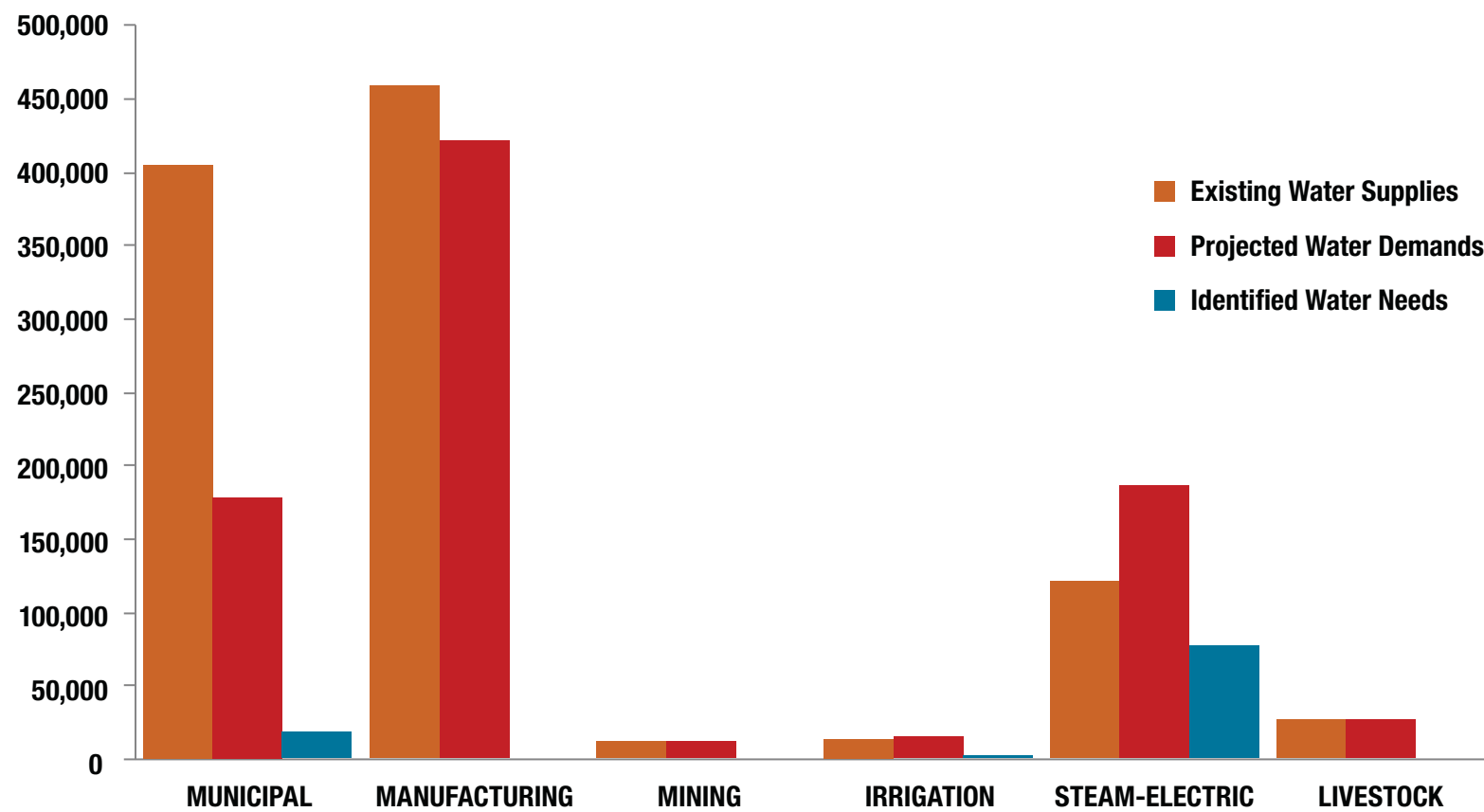
1. Region C Regional Water Planning Area Map and Summary Tables
2. Region D Regional Water Planning Area Map and Summary Tables
3. Map of Regions C and D Reservoirs—Existing and Potential
4. Revisions to be made in the Region D 2011 Regional Water Plan
5. Public Comments and Responses

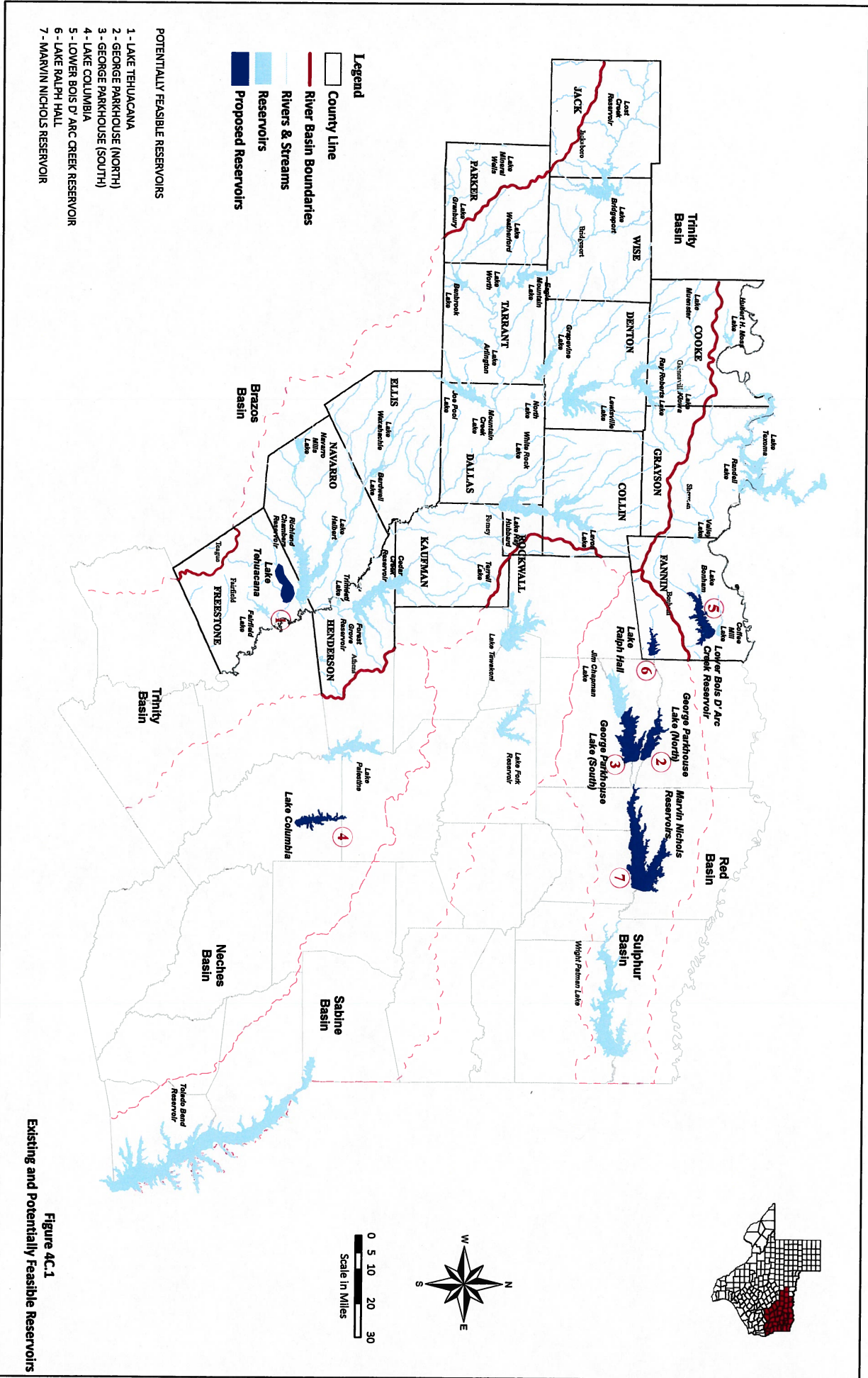






* Minor aquifer (only shown where there is no major aquifer)





Revisions To Be Made In The Region D 2011 Regional Water Plan

Delete the following portions of the Plan:

Page vi, Table of Contents, Section 7.0 Title beginning with “and the inconsistency . . .” to the end of the title

Page 7-1, Section 7.1, last paragraph, last four sentences beginning “This chapter will also address . . .”

Page 7-3, Section 7.3, second sentence in the paragraph beginning (“The Marvin Nichols I Reservoir . . .”

Page 7-3, Section 7.4, the next-to-last sentence beginning with the phrase “although the Marvin Nichols I Reservoir . . .” to the end of the sentence.

Page 7-11, Section 7.7, Conclusion, paragraph and Note.

Page 8-6, Section 8.4, paragraph beginning “Sulphur River . . .”

Page 8-16, Section 8.8, third paragraph beginning “It is the position . . .”

Pages 8-32 – 8-33, Section 8.12.1, last paragraph beginning “Therefore, the North East Texas . . .”

Page 8-35, Section 8.12.4, third paragraph beginning “The North East Texas . . .”

Page 8-36, Section 8.13.1, last paragraph beginning “Based on the reasons set forth. . . ,” and ending on page 8-37 with “. . . of the Texas Water Code.”

Page 8-49, Section 8.13.15, NOTE

COMMENTS IN RESPONSE TO DRAFT RECOMMENDATION

Comments received during the comment period and at the public hearings have been organized by the issues that were raised or discussed. Because of the large number of comments received, unique points have been highlighted and similar points have been combined. Responses are shown in *italics*.

THE RECOMMENDATION

Commenters frequently stated that State law requires the State Water Plan to protect the water, agricultural, and natural resources of the state. The proposed Marvin Nichols Reservoir does not do so based on the detrimental impacts of proposed reservoir and required mitigation would have on Region D. Commenters suggested that the recommendation directly contradicts the decisions of the state courts in this matter. The courts have rejected TWDB's narrow definition of what constitutes an interregional conflict—which means the EA is holding to a position that ignores the decisions of the courts.

One commenter suggested that, rather than defend a rule that has already been undercut by judicial review, the Executive Administrator should be focusing on correcting, not perpetuating a rule that got us to this point in the first place.

The Court of Appeals said “the Board can solve its dilemma by amending the rule defining an interregional conflict to include its present definition and the present situation where a region has studied the impacts and finds there is a substantial conflict.”¹ The Court did not tell the Board to eliminate the former definition, only to amend it to add the present situation.

Section 16.053(h)(7) provides that the TWDB may approve a regional plan only after it has determined that:

- (A) all interregional conflicts involving that regional water planning area have been resolved;*
- (B) the plan includes water conservation practices and drought management measures incorporating, at a minimum, the provisions of Tex. Water Code §§ 11.1271 and 11.1272 (relating to water conservation and drought contingency plans); and*
- (C) the plan is consistent with long-term protection of the state's water resources, agricultural resources, and natural resources as embodied in the guidance principles adopted under Tex. Water Code § 16.051(d).*

Subpart (A) addresses the allocation of water resources. The recommendation reiterates that no interregional conflict as defined in current Board rules² is present in this case. It also acknowledges the current conflict under Subpart (C) with regard to construction of a reservoir and long-term protection of resources in the area to be impounded.

¹ *Ward Timber*, 411 S.W.3d at 573.

² 31 TEX. ADMIN. CODE § 357.10(15).

The rule was put in place before the appellate court rendered its opinion. Amending the rule is a separate matter from resolving the conflict. No changes in the recommendations will be made based on these comments.

Commenters stated that requiring Region D to alter its plan is not acting in accordance with the “bottom up” water planning process. They assert that the courts remanded only Region C for resolution and thus, the TWDB has no right to instruct Region D to amend its plan.

The courts instructed the TWDB to resolve the conflict as required by statute. The statute requires the TWDB to resolve interregional conflicts. It also requires the involved regional water planning groups to prepare revisions to their respective plans based on the Board’s recommendations. Though the courts remanded only the 2011 Region C Water Plan as unapproved due to a conflict, Region D is an “involved region” under the statute for a number of reasons. Region D has an obvious stake in the resolution of the conflict. It raised the specter of a conflict in detail in its regional plan. It has participated vigorously in this resolution process. It is the location of the proposed reservoir and will be affected by the outcome of the resolution. Thus, it is appropriate to recommend revisions to the Region D Plan that reflect the Board’s resolution of the conflict.

The Executive Administrator makes no changes to the recommendation based on these comments.

Several commenters suggested making Marvin Nichols Reservoir an alternative strategy, not a recommended strategy, in the Region C Plan.

For the reasons set out in the draft recommendation, the Executive Administrator continues to favor Recommendation 2.a. However, if the Board wishes to consider revising the recommendation, it may consider instructing Region C to make Marvin Nichols Reservoir an alternative strategy and to elevate consideration and possible development of all other existing sources and water supply strategies to meet its water supply needs.

Commenters suggested tabling the issue until further negotiations and studies are done.

The Executive Administrator considered this option and decided not to recommend it. The regions are already at work on their 2016 plans. It is important to put this matter before the Board for resolution as instructed by the courts so that Regions C and D can put the 2011 plans behind them and focus on the 2016 plans and future regional water planning.

The mediation ordered by the Board in response to the court decisions is only the most recent attempt to resolve the conflict between Regions C and D. A previous study commission, established by the 80th Legislature in 2007 and consisting of members appointed by both regional water planning groups, was charged with reviewing the water supply alternatives available. But after a year of work, the Study Commission was unable

to reach a consensus on its findings and recommendations. The draft recommendations of that Study Commission tried to balance the interests of both regions and provide direction for moving forward. Like the recent mediation, the Study Commission failed. No changes in the recommendations will be made based on these comments.

One commenter asserted that the conflict is not about location of a reservoir, but about the impact. The conflict needs a compromise that takes into account both the need for water and protection of environmental, agricultural, economic, and natural resources.

It seems, however, that the two are tied together. The potential impact is a result of the identified location. It is difficult to imagine a situation in which the location could stay the same, but the economy and natural resources would not be affected. It is also hard to see how moving the location of the reservoir would remove the issue presented of protecting local resources.

A commenter asserted that the recommendation is inconsistent with the TWDB's own guidelines. It states that an additional 1.7 million acre-feet will be needed to meet the projected population growth by 2060. The Region C plans states that the projected growth is 6.5 million people. That comes to 234 gallons per person per day, or 94 gallons per day more than the TWDB has recommended. What gives them the right to play by a different set of rules?

This appears to be based on the Water Conservation Implementation Task Force study that came up with a recommended statewide goal of reducing total statewide water demand to an average of 140 gallons per capita per day (GPCD). The study itself notes that the 140 GPCD was a compromise that would need to be replaced with more meaningful goals and targets as data became available. The goal was never adopted by the TWDB because of the uncertainties surrounding it.³ It is not a Board recommendation.

Several commenters expressed concern regarding Recommendation 2.g. that states the issue of Marvin Nichols should not be raised in any future Region D water plan. They noted that there is no precedent for binding future regional water planning groups in this manner.

Recommendation 2.g. did not mean that the issue cannot be raised again in another context or before another agency, nor that Region D is unable to raise other issues in its plan. Region D may find other conflicts in future water plans, but resolution of this conflict should settle this particular matter.

With that said, based on the comments, the Executive Administrator is removing Recommendation 2.g. from the recommendations.

ECONOMIC ISSUES

³ See Texas Water Development Board Special Report, Water Conservation Implementation Task Force Report to the 79th Legislature, 61, 67 (November 2004).

Comments were received that Marvin Nichols Reservoir would mean lost revenues from farming, ranching, hunting leases and timber leases in the area. Commenters stated that the timber industry is vital to the area. And that it will be irreparably damaged by taking the reservoir and associated mitigation lands.

According to speakers for the industry, development of Marvin Nichols threatens future planned expansion of International Paper and the related timber industry. They asserted that, as a result of the loss of the timber industry, other industries connected to timber will be negatively affected (8 associated jobs for every International Paper job).

Other commenters wrote that farming has diminished significantly as an economic force in the area. Ranching has not brought in the jobs needed to keep youth in the area. These commenters suggest that a large lake with 70% of the shoreline in Red River County would make Clarksville, Bogata, Cuthand, Annona, Boxelder, and many smaller, once thriving, communities thrive again. There would be jobs for home builders, plumbers, road construction, electricians, and other trades. There will be a change—an influx of development, people seeking cabins for weekend getaways, and development along the shores of one of the largest lakes in Texas. This would all contribute to the entire North Texas economy.

Timber is currently a major industry in the area. But other options for income are available in the area that will be affected by the reservoir development. Creating the reservoir itself may also positively impact the economy. No changes in the recommendations will be made based on these comments.

ALTERNATIVES

A large number of commenters suggested that other options are available for water supplies to Region C that protect the natural resources of the State. They say expansion of Wright Patman Reservoir and Ray Hubbard, utilization of Lake Texoma and the Toledo Bend Reservoir, or combinations of these and other options would adequately supply Region C without the negative impacts associated with Marvin Nichols.

Most of the options mentioned have been included as strategies in the Region C Plan.

Other commenters noted that two hundred million acre-feet of water have flowed over Wright Patman dam on its way to the coast. Raise the water level of Wright Patman just a few feet and Region C will have all the water it needs to avoid developing Marvin Nichols. It will be less destructive to the economy and the land, even though it will have costs.

Wright Patman is a strategy in Region C's plan. But it, too, is not without its issues. To wait until the engineering and other questions are resolved before considering Marvin Nichols as a strategy in the plan leaves an unmet need in the plan.

Still other commenters proposed considering the Trinity River project as an alternative, and investing in the development of Lake Columbia?

Both of these strategies are included in the Region C Plan—the main stem Trinity River Pump Station as a recommended strategy and Lake Columbia as an alternative strategy.

Several commenters encouraged consideration of desalination of ocean water and brackish water before building a reservoir.

As with the other options listed, desalination, especially of brackish water, is an alternative being considered not only by Region C, but by other regions of the state, as well. In fact, desalination and blending projects are already under way in some areas of Region C, and desalination of water from the Gulf of Mexico is listed as a major, potentially feasible strategy.

One commenter observed that, since proposed in the first regional plan, the cost to develop Marvin Nichols has doubled and will likely double again before it is constructed. Commenters state that reservoirs are not a good option for water storage. Other commenters recommend looking to underground storage options for water diverted from the Sulphur River.

A commenter also observed that the aquifers continue to be depleted. By the time Marvin Nichols is actually built, there may not be any fresh water left to fill it from the nearby river or fresh water source. The commenter asserted that it is time for Texas to devise a modern, comprehensive solution to water management and develop innovative solutions rather than relying on a plan that was put in place in 1968.

The costs of all strategies in the water plans will increase over time. One reason the 82nd Legislature took the step of passing HB 4, HB 1025, and SJR 1 was to stimulate development of strategies in the State Water Plan as costs escalate. Rising cost does not justify removal of a strategy from a plan. The fact that all water sources are being stressed argues for keeping all alternatives available over both the near and far planning horizon.

CONSERVATION IN REGION C

A number of commenters expressed in various ways the concern that Region C residents waste an enormous amount of water. Some commenters suggested that conservation and reuse measures could be implemented that would meet the needs of Region C and should be addressed before any additional reservoirs are built. And one commenter pointed to San Antonio as having reduced its water consumption over the last two decades by 42% through conservation, while Region C has the highest per capita use of any area in the state.

One commenter, however, opposed to the inclusion of Marvin Nichols in the Region C Plan noted that the water demand projections for Region C have decreased considerably since the 2011 regional plan was prepared, and recent actions and new opportunities to enhance water conservation call into question any justification for the proposed reservoir, at least within the 50-year planning horizon. Water conservation is beginning to have an impact in Region C. The commenter asserted that the water demand projections for the next round of regional water planning show that—as a result of the lower projected per capita water use and some lower

population growth projections—the demand for water in Region C in 2070 is projected to be lower than the demand for water that had been projected for 2060 in the 2011 Region C plan—by about 300,000 acre-feet of water per year.

The commenter proposed that the TWDB, as an interim measure, remove the Marvin Nichols Reservoir from the 2011 Region C Plan and require that additional municipal water conservation be included to meet any resulting shortfall in water supplies. In effect, some of that is already happening, as is demonstrated by the lowered water demand projections for the new round of planning, and more conservation is possible given recent state and local actions. Another commenter noted that conservation measures introduced by Dallas Water Utility have saved an estimated 200 billion gallons and reduced “gallons per capita per day” by 22 percent. Dallas anticipates that approximately 25 percent of its future water needs will be met by conservation and reuse.

Current efforts made by the City of Dallas and others in Region C to reduce per capita consumption through conservation measures are having positive results. Conservation and reuse strategies could account for as much as 30 percent of projected 2060 volumes. But to assume that Region C will be able to meet its long-term needs with current supplies and increased conservation is not practical. Other commenters, even those against development of Marvin Nichols, acknowledge that Region C will need additional water supplies in the future.

Several commenters noted that Region C (the Metroplex) has 126 billion gallons in reserve in its plan. There is no need for Marvin Nichols with such excess capacity already available. Another commenter quoted the figure as a surplus of 700,000 acre feet available.

The Region C Plan states that the reserve is reasonable to provide for difficulties in developing strategies in a timely manner, the occurrence of droughts worse than the drought of record, greater than expected growth, and supply for needs beyond this planning horizon. Presumably, that figure will be adjusted as strategies are developed and contingencies are faced. It is important to note that the surplus is calculated on the basis of the entire region. Removing Marvin Nichols as a strategy affects only certain water user groups and water providers. There would not be a one-for-one tradeoff between removing Marvin Nichols and adjusting the amount of surplus.

SOCIAL ISSUES

The majority of commenters expressed concern that development of Marvin Nichols as projected will destroy homesteads, cemeteries, Native American burial grounds, other historic sites in the area and vital habitat. Another commenter suggested that, given the proposed location of the reservoir, it is not likely that even one residence will be disturbed.

Until a final proposal for the reservoir is before the permitting agencies, the extent of its footprint is difficult to assess. With regard to cemeteries and historic sites, other agencies will oversee assessment of any sites and removal to other locations.

ENVIRONMENTAL ISSUES

A commenter suggested that mitigation would require an area the size of Titus County. The question was asked, “Where do we find that much available land?” Other commenters noted that the location of the reservoir *and* of likely mitigation land put the entire burden on the shoulders of Region D. Even commenters who were not opposed to development of the reservoir expressed concern regarding mitigation, suggesting that the area required for mitigation should be reduced to the least amount possible.

Several figures were suggested for the amount of land that would be needed for mitigation, which suggests that the amount required is not known and will not be known until the issue is reviewed by the agencies that determine the amount of mitigation needed.

OTHER COMMENTS

One commenter observed that the footprint of the proposed reservoir lies over the Mexia-Talco Fault and the Luann Salt—unstable conditions for the development of a large reservoir.

The Luann Salt is a formation that underlies much of eastern and southern Texas; it is deep below the surface and below the East Texas aquifers. The Mexia-Talco Fault is an inactive fault line that runs through the area. It is not possible at this time to tell what, if any, impacts these geologic formations may have on the viability of the development of Marvin Nichols Reservoir. This issue will be fully examined when an Environmental Impact Statement is prepared for the Clean Water Act Section 404 permit process with the U.S. Corps of Engineers. No changes in the recommendations will be made based on this comment.

One commenter wanted to know how an acceptable fair market value is determined when there is no willing seller. Another commenter suggested that land owners be compensated for any land acquired for the development of the reservoir in accordance with the *Uniform Standards of Professional Appraisal Practice*.

A number of tools are available for determining property values. The process for land acquisition is set out in detail in statute.⁴ No changes in the recommendations will be made based on these comments.

The need for Region C is in the future. The impact on Region D is immediate, not speculative.

The Region C Plan shows that Marvin Nichols is a strategy for future needs. But the comments received do not show how the impact on Region D is immediate. The impacts are not speculative. But people and businesses will have an opportunity to make adjustments, develop new options, and prepare.

⁴ See Tex. Prop. Code Ch. 21.

A commenter suggested that the proposed reservoir may not rank high on several criteria in the new regional prioritization process, especially as certain factors in flux are likely to impact its ranking in a negative way. The commenter also observed that, even if continued in the Region C water plan, any effort to actually build the reservoir is going to involve a lengthy, protracted, and expensive permitting process that has no guarantee of success.

Until the SWIFT rules are adopted, any assumptions regarding how prioritization will be applied and its impacts assessed are premature. Many of the projects in the regional water plans will involve lengthy processes to move from planning through design to implementation. Lack of certainty at this stage is not a reason to remove an otherwise feasible alternative from a regional plan. No changes in the recommendations will be made based on this comment.

A commenter recommended that the TWDB clarify the last sentence in the first paragraph under “Summary” to make clear that the TWDB may only waive the consistency requirement for financing projects not necessarily identified in the SWP only when the financial assistance will not be from the WIF, SWIFT, or SWIRFT.

The Executive Administrator agrees with this comment because of the need for clarity in stating the relationship between the statutory requirements related to the State and regional water plans and the funding programs managed by the TWDB.

A commenter expressed concern that Region D is restricted from access to WIF, SWIFT, and SWIRFT fund due to the conflict, as the Region D 2011 Water Plan has been adopted and approved and was not in part of the District Court order.

There may be a question as to whether the courts remanded both regional plans to the Board for further action. However, granting that the approval of Region D’s plan may not have been reversed, there is no uncertainty that the Court of Appeals saw resolution of the conflict as involving both regions.⁵ Under Tex. Water Code § 16.053(h)(6), on resolution of the conflict, the involved regional water planning groups shall prepare revisions to their respective plans; consider all public and board comments; prepare, revise, and adopt their respective plans; and submit their plans to the Board for approval and inclusion in the state water plan. The Executive Administrator makes these recommendations in accordance with those statutory instructions. For the reasons discussed above, both plans must reflect the Board’s resolution of the conflict in order to be approved and included in the State Water Plan. Approval will determine whether projects in a region are eligible for funding from TWDB programs under the applicable statutes or that may require a waiver.

⁵ See, e.g., *Ward Timber*, 411 S.W.3d at 574 (“By complying with Section 16.053(h)(6) and facilitating coordination between the two regions to resolve the major conflict in the two plans, the Board will be carrying out the purpose of the state water plan.”); and at 575 (“The Region D planning group in its Region D plan made a preliminary case that there is a substantial interregional conflict with Region C’s plan, and that should be sufficient for the Board to require the two regional planning groups to attempt to resolve that conflict.”)

One commenter suggested that the TWDB take direction from the Texas Constitution, Section 49-d by encouraging optimum development of the limited number of feasible sites available for the construction of dams and reservoirs.

The Executive Administrator agrees with the comment and notes, further, that the Legislature provided funds to encourage optimum regional development of projects including the design, acquisition, lease, construction, and development of reservoirs.⁶

Another commenter urged that state water is a state resource, and asked that the TWDB not remove a vitally important strategy at this early stage of the process.

The Executive Administrator agrees with this comment. One of the purposes of the planning process is to provide an opportunity for regions of the state to explore options, strategies, for the development of the State's waters, "which waters are held in trust for the use and benefit of the public."⁷ From those options, the regions determine which are most appropriate for development at a given time.

One commenter stated that resolution of the conflict is urgently needed so that the regions can move on with planning and consideration of all options.

The Executive Administrator agrees with this comment. Some commenters have asked for more time to negotiate further. As noted above, attempts to reach a negotiated agreement between the regions have failed on more than one occasion. The Plaintiffs in Ward Timber asked the courts to instruct the Board to resolve the conflict they identified. The courts did that. This recommendation to the Board is in response to the Court's order.

A commenter recommended that the Executive Administrator clarify the last sentence in the first paragraph under "Summary" to make clear that the TWDB may only waive the consistency requirement for financing projects not necessarily identified in the SWP only when the financial assistance will not be from the WIF, SWIFT, or SWIRFT, such as:

*"With the exception of the Water Infrastructure Fund (WIF), the State Implementation Fund for Texas (SWIFT), and the State Water Implementation Revenue Fund for Texas (SWIRFT), which require that a project be in the State Water Plan, the TWDB may provide financial assistance if a water project is *consistent* with the Plan, not necessarily *in* the Plan. The TWDB may waive the requirement for consistency with the State Water Plan if a financial assistance application is for financing under a TWDB program other than the WIF, SWIFT, or SWIRFT, and the TWDB determines that conditions warrant the waiver."*

The Executive Administrator agrees with the commenter that this point needs to be made clear. The language in the Summary section of the recommendation has been revised with this in mind.

⁶ Tex. Water Code § 16.131.

⁷ TEX. CONST. art. III, § 49-d(a).